

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

74-2194

IN THE
Supreme Court of the United States
FOR THE SECOND CIRCUIT

In The Matter of

ARBOR HOMES, INC.,
Bankrupt.

ALLAN RUBIN HOMES, INC., ALLAN
RUBIN HOMES MILFORD, INC., and
ALLAN RUBIN HOMES CLINTON, INC.
Claimants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the DISTRICT OF CONNECTICUT

APPENDIX TO BRIEF FOR APPELLEE

PAGINATION AS IN ORIGINAL COPY

APPENDIX

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May 20, 1971

Paul P. Posin, President
Arbor Homes, Inc.
1261 Meriden Road
Waterbury, Connecticut 06720

Dear Mr. Posin:

Arbor Homes New Haven, Inc. et al have for some time been dissatisfied with shoddy workmanship, failure to provide shell-erection crews and the like, relative to pre-fabricated buildings under the agreement of November 10, 1962.

Although dissatisfied, the contractor under said agreement has not seen fit to formally place you on notice as to said defects under paragraph 12 of the agreement. We now find that in addition to the foregoing, the materials utilized by your firm have been inferior and of a grade which we believe to be totally unacceptable and in complete violation of paragraph 9 of the agreement in question, which calls for materials to be utilized "in accordance with the usages of the trade".

Hence demand is hereby made upon you under section (a) of paragraph 12 of said agreement relative to this most major and serious violation.

Very truly yours,

Edward L. Marcus

ELM:plj
cc: Weisman & Weisman
cc: A. Rubin

June 4, 1971

Attorney Edward L. Marcus
38 Trumbull Street
New Haven, Connecticut 06510

Dear Attorney Marcus:

We have noted your letter of May 20, and have made a physical check of the units outlined. We have, in addition to our own people, asked for a professional lumberman to make an inspection on our premises, and we reviewed with him the problems which you have outlined.

Our inspection has shown that there is a minimum amount of utility lumber in some of the units and none in many of the others. As a matter of fact, many of the units were substantially complete, and, as a result, only the flooring joists and ceiling rafters could be inspected. To our knowledge, the only job which required substantive change was the Cronan job in Woodbridge and this amounted to less than a dozen pieces and was done three or four months ago. However, I must point out that all of this lumber falls within the accepted standards of lumber usage.

For your further information, I should point out that according to lumber standards 10 percent of the studs used in a house may be of utility grade. In none of the units that were inspected was there anywhere near this type of usage. For the sake of the record, I should also point out that we do not as a matter of practice buy utility grade lumber.

I hope this will clear up this matter, and should you have any further questions, please do not hesitate to call me.

Sincerely,

ARBOR HOMES, INC.

dm

cc: Weisman & Weisman
A. Rubin

Paul P. Posin
President

Extracts From Contract Dated November 10, 1962

11. In the event that any dispute shall arise as to whether or not there has been a violation of an essential term of this Agreement, by either party, such dispute shall be submitted to three arbitrators who shall conduct such hearings as a majority of the arbitrators shall determine to be adequate for the purpose of resolving such dispute. Each party shall within 60 days after execution of this Agreement designate in writing to the other the name of one arbitrator of its choice, each of whom shall be known as a permanent arbitrator. Each party may at any time designate a replacement for the permanent arbitrator chosen by it. Either party may give written notice to both permanent arbitrators and to the other party that a dispute exists, and upon such notice the two permanent arbitrators shall jointly agree upon a third arbitrator within one week to act with them upon said dispute only. If at the end of such week said two permanent arbitrators have not agreed on a third arbitrator, such third arbitrator shall be designated by the Commercial Arbitration Tribunal of the American Arbitration Association. A majority of said arbitrators shall have the power to decide the issues presented by the dispute. Said decision shall be stated in writing, and the parties hereto agree to be bound by said decision.

All costs of the arbitration proceeding, including reasonable fees of all the arbitrators, shall be paid by the party against whom the issues are decided.

12. Either party claiming to be aggrieved by the violation, on the part of the other party, of an essential term of this Agreement (except the provisions set forth in subparagraphs 2 (c) and (d) hereof, which subparagraphs are sui generis in so far as the result of a violation thereof is concerned) shall make such claim in accordance with the procedure hereafter stated, which procedure shall be a condition precedent to the right of a party to recover damages or enforce any other remedies to which it may be entitled on the ground of breach of this Agreement:

(a) A party claiming to be aggrieved by a violation on the part of the other of any essential term of this Agreement shall give written notice to the other party stating the nature and date or dates of said violations.

(b) The party receiving such notice shall have thirty days in which to cure said violation.

(c) At the expiration of said thirty-day period, the aggrieved party may give a second notice by registered mail, return receipt requested, to the other party that said violation has not been cured, and failure to furnish such second notice within three days after said expiration shall be deemed acknowledgment that said violation has been cured.

(d) Upon receipt of such second notice, the other party shall have ten days thereafter in which to submit for arbitration a dispute containing 3 issues:

(1) Whether or not there was such a violation upon its part.

If (1) is found in favor of the aggrieved party, then,

(2) Whether or not the violation was of the same nature as a violation which the other party had committed within a period of 12 months immediately preceding the date of submission.

If (2) is found in favor of said other party, then,

(3) Whether or not the violation was cured within 30 days after the original notice thereof.

(e) In the event that upon receipt of such second notice, the other party shall fail to submit said dispute for arbitration as provided in the foregoing subparagraph, or in the event that said dispute having been submitted the arbitrators find issues (1) and (2) in favor of the aggrieved party, or in the event that the dispute having been submitted the arbitrators shall have found issues (1) and (3) in favor of the aggrieved party and the other party within a 30 day period after such decision

shall have failed to comply with the order of the arbitrators, this Agreement shall be terminated by virtue of the occurrence of any one of such events.

(f) The parties hereto hereby covenant and agree that, upon such termination, the aggrieved party has the right to bring suit for damages based on the violation leading to arbitration and for any damages that have resulted or may result from any other violation that may have occurred in time subsequent to said violation leading to arbitration and the other party by virtue of this express provision is estopped from asserting any defense as to such suit, it being expressly understood that the only contest in court upon such suit will be on the measure of damages.

(g) In the event that the Contractor was the aggrieved party in effecting such termination, then the Contractor shall have the right to continue to utilize the names "Arbor Homes New Haven, Inc." and "Arbor Homes Clinton, Inc.", without any limitation of time, but limited to the extent of the territory described in paragraph 4 hereof, provided, however, that in the event the majority of the arbitrators shall determine that such violation on the part of the manufacturer was a deliberate and patent act on its part for the purpose of causing the termination of this Agreement, the said territory in which the Contractors shall then have such right shall be enlarged to the entire State of Connecticut.

(h) In the event that the Manufacturer was the aggrieved party in effecting such termination, then the Contractor shall have no further right to the use of the name "Arbor Homes" in any form whatsoever, and the Contractor expressly covenants to proceed diligently to take whatever steps are necessary either to legally change the name of its corporations so as to eliminate the word "Arbor" therefrom, or to dissolve said corporations, and further to refrain from knowingly, performing any act tending to preserve any right in anyone other than the Manufacturer to use the name "Arbor Homes".

Transcript of April 25, 1972

Cross Examination of Allan Rubin by Mr. Rosnick:
(T. p. 19)

Q When you received this correspondence, I'm talking about Debtor's Exhibit D, August 13, did you discuss it with Mr. Greeley?

A Yes.

Q Did you discuss it at length?

A No.

Q What else did you do on August 13 with respect to that letter if anything?

A I worried a lot.

Q Is there anything else that you did as a result of seeing that letter on August 13?

A No, not in particular.

Q Did it mean to you that Arbor Homes was no longer honoring its contract?

A Yes, I felt that way.

Q There is a list of homes and buyers on this Exhibit D to which Mr. Mucci referred when he sent: None of the houses above are scheduled for delivery.

A Yes.

Q Did you check to see whether the foundation of those houses had already been in?

A No, I did not.

Q Did you check whether your Allan Rubin Homes had given the notice or telephone call, whatever method was used to notify Arbor Homes that they were to be delivered?

A No, I did not.

Q Did you check as to whether Allan Rubin Homes, Inc. or any of the corporations you are talking about had furnished the promissory note or assignment with respect to each of these houses?

A No.

Q Or with respect to any of them?

A No.

Q Did you check as to what was the recent experience of your corporations with respect to deliveries from Arbor Homes in the past few weeks before August 13?

A I didn't have to check.

Q Well, my question was did you check?

A No.

THE COURT: Is that question, did you check to see if there had been any deliveries within the last few weeks, was that the question?

MR. ROSNICK: Yes, your Honor,

Q What was the experience with the Allan Rubin Homes with respect to receiving deliveries of houses during the several three weeks before you received this letter and you said you didn't check?

MR. BURNS: I think the answer was he didn't have to.

MR. ROSNICK: He also said that but I'm also saying, did you check.

Q You say you didn't have to check. If you were concerned with whether or not Arbor Homes is breaking a contract with you, didn't you have to check on the status of the deliveries before that in order to make rational decisions as to whether they were actually --

THE COURT: Let me ask you this. Do you claim that there were deliveries within the last few weeks before August 13?

MR. ROSNICK: Oh, Yes.

THE COURT: All right. You have some evidence to that effect I assume.

MR. ROSNICK: Yes, sir.

A Would you ask the question again?

Q My question to you is this, Mr. Rubin, you said that when you received this letter which meant to you that Arbor Homes, the corporation that was very closely allied with yours, would no longer deliver, you said you didn't have to check to see whether they have been delivering in recent weeks just before you received this. I'm asking, didn't you really have to check in order to reach a business judgment as to whether or not --

A No.

Q -- Arbor Homes was really saying to you they weren't going to deliver?

A No. I didn't have to check because I was kept up to date on a day to day basis on the general situation and I usually check in that way, on a regular basis, but not at the moment because I had to go back and check.

Q Had you been having a delivery problem with Arbor Homes as to delivering houses before you received this communication, August 13, 1971?

A You mean just prior to this time?

Q At any time prior to that, six months before that to the six months before August 13?

A Well, I don't recall any unusual delivery problems over that six months period of houses per say, except that the houses weren't complete.

Q All right. You are now saying that you did have some shortages in packages being delivered to you, but there weren't any problems with delivery of a house ordered up to this time, is that a fair statement of your testimony?

A I don't know, I don't know what to make of the statement that there weren't any problems. There weren't any problems that came to my attention, that I recall.

Q None that would make you worry about whether or not Arbor Homes was going to be able to deliver houses to you prior to this August 13 letter, isn't that correct?

A No.

Q Are you saying now that you were worried about whether Arbor Homes would deliver houses to you when ordered prior to August 13?

A Yes, I was worried.

Q All right. When did you begin to have that worry?

A I would say six or eight months prior to the filing.

Q You are saying that the question of whether or not Arbor Homes would deliver when your order was in was bothering you six or eight months prior to August 13, 1971?

A I didn't say that, I said I was worried that they possibly would not be able to in the future during that period based on the fact that there were so many shortages of other materials that held our jobs up for a long period of time.

Q What I'm trying to make clear here, and if I'm wrong you can say so, I'm trying to show, have the evidence show that there was no concern about deliveries of houses ordered by you, the entire package, on the basis of your experience with Arbor Homes until August 13, 1971, isn't that a fair statement the way things were?

A On that basis alone I would say that is true . . .

Cross Examination continued by MR. ROSNICK:
(T. p. 27)

Q On direct examination by Mr. Burns in this Court about ten days ago, Mr. Rubin, do you remember being asked this question by Mr. Burns. (Reading.)
"Question: After your meeting in June with Mr. Posin and Mr. Molinari, what happened with respect to the problems which you have stated you had been experiencing, how did you attempt to treat them?"
Now, I read the question as it appears in the transcript and my question to you is, do you remember being asked that question: ?

A Yes.

Q And the June we are talking about is 1971, do you remember that?

A Yes.

Q And, do you remember answering that question this way: (Reading.) "Answer: There wasn't anything that we could do except wait for them to perform, that is Arbor Homes to perform, and there wasn't any remedy of the situation and they continually got worse." Do you remember that answer?

A Yes.

Q Now my question to you today, then, Mr. Rubin, is: Didn't you have a remedy in your contract to send a letter to them stating a violation of the contract and invoking the provisions.

MR. BROWNSTEIN: I'm going to object to that, if your Honor pleases. Isn't that a legal conclusion for the Court to draw from the evidence that has been submitted?

THE COURT: I think that what counsel is asking is why he didn't follow the procedure that the contract called for cancellation.

MR. BORWNSTEIN: Let him ask that. Why be so abstruse or indirect?

THE COURT: Maybe he will as long as you and I stop talking.

MR. BROWNSTEIN: On that assumption I'll stop.

BY MR. ROSNICK:

Q I'll ask that question this way: Why didn't you have your attorney send a letter making a claim, claiming a violation of Arbor Homes just as he had done the month before, May 20, 1971?

A Probably because I felt that it would have taken too long and it wouldn't have made any difference at that point.

Q Let me point out to you, Mr. Rubin, that your letter of May 20, 1971 was followed by Mr. Posin's letter of June 4th, 1971 to Attorney Marcus and it answers all of the objections made by Mr. Marcus which apparently resolved that problem. So, I'm going to ask you again in view of the fact that there was a two weeks response or correction to the violation, whatever you will claim in this Court, don't you feel now that if you were in the position to have made a claim of a violation of the contract in July 1971 --

MR. BROWNSTEIN: That's objected to, if your Honor pleases. He asking him today what he would have done some while ago. I think what you are trying to do is elicit facts.

THE COURT: I think we are getting very close to the argument of inferences that I have to draw of what the people have done and I'm not sure it's very helpful to the Court what Mr. Rubin's answer one way or the other might be on a question like this.

MR. ROSNICK: I think, your Honor, the position of Mr. Brownstein is well taken and your Honor's position is well taken except for the fact that on direct this same witness testified that at this point there wasn't any remedy. I think having so testified, he has opened this to me and I'm now able to proceed on the basis of the cross examination with respect to the statement he made on direct, that's why I read that into the record.

THE COURT: Would you repeat your question again?

BY MR. ROSNICK:

Q Mr. Rubin, there wasn't any reason at all in July of 1971 why you couldn't have followed the same remedy with respect to the contract that you had followed in May 20, 1971, was there?

A No, there wasn't any reason why I couldn't have done it.

Transcript of Wednesday - April 26, 1972

F R A N K L E R O S E,

called as a witness on behalf of the creditor, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ROSNICK:
(T. p. 2)

Q Mr. LeRose what is your position with Arbor Homes since the filing of the motions?

A I'm vice-president, also assistant to the president.

Q That's Mr. Poisen?

A Mr. Poisen.

Q You've been with Arbor Homes a number of years?

A Sixteen.

Q Now did you in your capacity as assistant manager check the records of the Arbor Homes Incorporated to determine the last date a house was shipped to Alan Rubin Corporation?

A Yes I did.

Q What was the date?

A The last shipment was on August 9th.

Q What Year?

A 1971.

Q Did you also check the records to ascertain the date on which the last order was received from Alan Rubin Homes?

A Yes I did.

MR. BROWNSTEIN: Wait just a moment,. You say the last order. That troubles me. Are you talking about the last purchase order, the last time they were told to deliver?

Q The last time you received a purchase order?

A Yes I did. The last time I received a purchase order was on August 13th.

Q What year?

A 1971. And the name of the customer was Holdberg.